

2004

Utah Department of Public Safety, Driver's License Division v. Robot Aided Manufacturing Center, Inc. dba Explore Information Services, and State Records Committee v. Robot Aided Manufacturing Center : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF PUBLIC
SAFETY, DRIVER'S LICENSE
DIVISION,

Appellee/Petitioner,

vs.

ROBOT AIDED MANUFACTURING
CENTER, INC. dba EXPLORE
INFORMATION SERVICES, and STATE
RECORDS COMMITTEE

Appellant/Respondents.

Appellate Case No. 20040010-CA

District Court No. 000910012 AA

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code § 78-2-2(3)(j). However, the Utah Supreme Court has exercised its authority pursuant to Utah Code § 78-2-2(4)(a) to transfer this Appeal to the Utah Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE I

Explore's access to the Division records is controlled by Utah Code Ann. § 53-3-104 (2000), not by GRAMA.

A. Standard of Appellate Review

The issue is a question of law presenting a question of statutory interpretation. It was reviewed under a correction of error standard. Graham v. Davis County, 979 P.2d 363 Utah Adv. Rep 19 (Utah Ct. App. 1999); Jeffer v. Stubbs, 970 P.2d 1234 (Utah 1998).

ISSUE II

Explore is not entitled to the records since it did not apply for nor is it qualified to receive the records pursuant to Utah Code Ann. § 53-3-104 (2000).

A. Standard of Appellate Review

The issue is a question of law presenting a question of statutory interpretation. It was reviewed under a correction of error standard. Graham v. Davis County, 979 P.2d 363 Utah Adv. Rep 19 (Utah Ct. App. 1999); Jeffer v. Stubbs, 970 P.2d 1234 (Utah 1998).

ISSUE III

To the extent Explore's record request is pursuant to or controlled by GRAMA, access to the records was properly denied.

A. Standard of Appellate Review

Part of the issue concerns review of factual determinations by the trial court, which are upheld unless clearly erroneous. Young v. Young, 979 P.2d 338 (Utah 1999). The issue also involves a question of statutory interpretation, which is reviewed under a correction of error standard. Graham v. Davis County, 979 P.2d 363 (Utah App. 1999); Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998).

ISSUE IV

The Drivers Privacy Protection Act of 1994 (DPPA) is a federal act that does not grant rights of access to state government records.

A. Standard of Appellate Review

The issue is a question of law presenting a question of statutory interpretation which is reviewed under a correction of error standard. Graham v. Davis County, 979 P.2d 363 Utah Adv. Rep 19 (Utah Ct. App. 1999); Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The following statutes may be determinative of the Appeal or of central importance to the Appeal. The statutes provide in pertinent part:

DRIVERS LICENSE DIVISION DUTIES

Utah Code Ann. § 53-3-104 (2000). Division duties

The division shall:

- ...
- (9) search the license files, compile, and furnish a report on the driving record of any person licensed in the state in accordance with section 53-3-109.

Utah Code Ann. § 53-3-109 (2000). Records – Access – Fees – Rulemaking.

- (1)
 - (a) Except as provided in this section, all records of the division shall be classified and disclosed in accordance with Title 63, Chapter 2, Governmental Records Access and Management Act.
 - (b) The division may only disclose personal identifying information:
 - (i) when the division determines it is in the interest of the public safety to disclose the information; and
 - (ii) in accordance with the federal Driver's Privacy Protection Act of 1994, 18 U.S.C. Chapter 123.
- (2) A person who receives personal identifying information shall be advised by the division that the person may not:
 - (a) disclose the personal identifying information from that record to any other person; or
 - (b) use the personal identifying information from that record for advertising or solicitation purposes.
- (3) The division may:
 - (a) collect fees in accordance with Section 53-3-105 for searching and compiling its files or furnishing a report on the driving record of a person; and
 - (b) prepare under the seal of the division and deliver upon request, a certified copy of any record of the division, and charge a fee under Section 63-38-3.2 for each document authenticated.
- (4) Each certified copy of a driving record furnished in accordance with this section is admissible in any court proceeding in the same manner as the original.
- (5) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division may make rules to designate what information shall be included in a report on the driving record of a person . . .

GOVERNMENTAL RECORDS ACCESS MANAGEMENT ACT (GRAMA)

Utah Code Ann. § 63-2-201 (2002). Right to inspect records and receive copies of records.

- (2) All records are public unless otherwise expressly provided by statute.
- (3) The following records are not public:
 - (a) Records that are private, controlled, or protected under section 63-2-302 . . . and
 - (b) Records to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds.
- (5)
 - (a) A governmental entity may not disclose a record that is private, controlled, or protected to any person except as provided in Subsection (5)(b), Section 63-2-202 or Section 63-2-206.
 - (b) A governmental entity may disclose records that are private under Subsection 63-2-302(2) or protected under Section 63-2-304 to persons other than those specified in Section 63-2-202 or 63-2-206 if the head of a governmental entity, or a designee, determines that there is no interest in restricting access to the record, or that the interests favoring access outweighs the interest favoring restriction of access.
- (6)
 - (a) The disclosure of records to which access is governed or limited pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or limited as a condition of participation in a state or federal program or for receiving state or federal funds, is governed by the specific provision of that statute, rule, or regulation.
 - (b) This chapter applies to records described in Subsection (6)(a) insofar as this chapter is not inconsistent with the statute, rule, or regulation.

Utah Code Ann. § 63-2-202 (2000). Access to private, controlled, and protected documents.

- (1) Upon request, a governmental entity shall disclose a private record to:
 - (a) the subject of the record;
 - (b) the parent or legal guardian of an unemancipated minor who is the subject of the record;

- (c) the legal guardian of a legally incapacitated individual who is the subject of the record;
- (d) any other individual who:
 - (i) has a power of attorney from the subject of the record;
 - (ii) submits a notarized release from the subject of the record or his legal representative dated no more than 90 days before the date the request is made;
 - (iii) if the record is a medical record described in Subsection 63-2-302(1)(b), is a health care provider, as defined in Section 26-33(a)-102, if releasing the record or information in the record is consistent with normal professional practice and medical ethics; or
- (e) any person to whom the record must be provided pursuant to court order as provided in Subsection (7) or a legislative subpoena as provided in Title 36, chapter 14.

Utah Code Ann. §§ 63-2-302 (2000). Private records.

- (2) The following records are private if properly classified by a governmental entity:
 - ...
 - (d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal of the District Court Judgment and Order, Findings of Fact and Conclusions of Law that determined that the Division's denial of access to its records was proper and lawful and that it need not provide the records as requested.

COURSE OF PROCEEDINGS

On June 28, 2000 the Division informed Explore they it would not provide records as requested by Explore because Explore failed to comply with the requirements of Utah

Code § 53-3-104(9) and additionally that the records were private and that Explore was not authorized to receive private records. Findings of Fact N. 7.¹ By decision dated July 21, 2000, the Department of Public Safety affirmed the Division's determination by written decision, which decision was appealed to the State Records Committee. Findings of Fact N. 8. Ultimately, the State Records Committee issued its decision on November 15, 2000 granting Explore's Appeal and requiring access to the records of the Division. Findings of Fact N. 10. The Division appealed the State Records Committee's decision to the district court pursuant to Utah Code § 63-2-404 and, following a trial based upon stipulated facts, the trial court entered written Findings of Fact, Conclusions of Law, Judgment and Order. R at 227-238.

Explore appealed the district court's Judgment and Order to the Supreme Court, R at 250-252, and the Supreme Court transferred the case to the Court of Appeals pursuant to Utah Code § 78-2-2(4). R at 262.

DISPOSITION BELOW

After a trial on stipulated facts, the district court entered Findings of Fact, Conclusions of Law, Judgment and Order. That Judgment and Order determined that the Division's denial of access to the requested information was proper and lawful, that the

¹The Division's references are to the Findings of Fact and Conclusions of Law made and entered by the Trial Court at Record 227-237. The Findings are not challenged by Explore, are included in the Division's Addendum, and will be referenced as Findings of Fact and not the various references in the record.

Division need not provide the records as requested, and reversed and vacated the State Records Committee's decision to the contrary. R. at 227-238.

STATEMENT OF RELEVANT FACTS

Utah Department of Public Safety, Driver's License Division (Division) is an agency of state government that is required to maintain records and files with regard to over 1.4 million licensees and identification card holders in the State of Utah. These records and files are maintained in an electronic database which includes various items, such as: every application for a license including items of personal information contained therein, such as name, date of birth, social security number, mailing address, physical description; records of convictions of traffic offenses, including day, location and personal information on the individual conviction; financial responsibility reports regarding accidents; insurance filings; medical and psychological reports from physicians and other health care providers; departmental and administrative actions against licensees; address and name changes; and records and details from various court records. Findings of Fact N. 1.

Through the 1980's the Division sold a list of its licensees and provided information, upon request, to anyone concerning the driving record of an individual, including various items of personal information. Findings of Fact N. 2. After the adoption of the Governmental Records Access Management Act (GRAMA) in 1991, the Division determined that some of the information in this database involving its licensees

was protected, some was confidential, some was prohibited by statute from being released, and that all of the information in the database were records containing data on individuals. The Division reasonably determined that disclosure of such information on individuals would constitute a clearly unwarranted invasion of personal privacy and therefore classified its records as Private under GRAMA. Findings of Fact N. 3. This decision was based upon Attorney General's Opinion 85-02, which determined that driver's license information should not be released except pursuant to statutory provisions because such release invades the privacy rights of licensees, and the further bases that the information and records sought were personal data and information on individuals that the Individuals may not want to have released or made public, that the Division was merely a repository of the information provided by other agencies, and that the personal information would not shed light on the actions of the government or the Division.

Findings of Fact N. 3.

Up through the 2000 Legislative session the Division was required to provide, upon request, the report of the driving record of any person licensed in the State. This Motor Vehicle Report (MVR) was available through Utah Code § 53-3-104(9) if the requestor was qualified to receive the information and identified the individual person that whose driving record information was sought. This MVR consisted of the driver's name, license number, date of birth, five digit zip code, military status, reportable arrests and convictions, reportable departmental actions, driver's license status, driver's license

issue and expiration dates, license class/type/endorsements, and reportable failures to appear or failure to clear tickets or warrants. Findings of Fact N. 4 and 14.

Robot Aided Manufacturing Center Inc. dba Explore Information Services (Explore) is a Minnesota corporation. As part of its business, it obtains certain driving information contained within the motor vehicle records of various states and provides this data to certain property and casualty insurance companies for underwriting purposes. Findings of Fact N. 11. Explore is seeking from the Division, on a monthly basis, a list of all licensees who had a traffic violation or departmental action placed on their record in the previous month, and in addition the licensee's name, driver's licence number, date of birth, type of violation, and when the violation was recorded in the database. Findings of Fact No. 6. This request requires the Division to search its files and prepare a report on the driving record of each such licensee. Findings of Fact N. 6. In July 2000 Explore received 22,932 such records, which was approximately 2% of licensed drivers. Findings of Fact N. 16.

This information sought by Explore was for commercial and insurance underwriting purposes unrelated to the activities of the Driver's License Division. Findings of Fact N. 11 and 16.

SUMMARY OF ARGUMENT

POINT I

EXPLORE'S ACCESS TO THE DIVISION RECORDS IS CONTROLLED BY UTAH CODE ANN. § 53-3-104 (2000), NOT BY GRAMA.

GRAMA recognizes that it is not the exclusive statutory provision that governs or allows access to government records. Utah Code § 63-2-201(6)(a) provides the disclosure of records to which access is “governed or limited” pursuant to another state statute “is governed by the specific provisions of that statute.” Utah Code § 53-3-104, dealing with Driver’s License Division duties, indicates that the Division shall search its files, compile, and furnish a report on the driving record of any person upon request of qualifying individuals. This statute governs or limits access to the driving record of any person and therefore controls access to the records, rather than the provisions of GRAMA.

POINT II

EXPLORE IS NOT ENTITLED TO THE RECORDS SINCE IT DID NOT APPLY FOR NOR IS IT QUALIFIED TO RECEIVE THE RECORDS PURSUANT TO UTAH CODE ANN. § 53-3-104 (2000).

Explore has not sought to receive the records under the provisions of Utah Code § 53-3-104, but rather is seeking them generally under GRAMA. Further, Explore’s request does not qualify under § 53-3-104 because Explore does not identify an individual

on whom the Division should search its files and compile and furnish a report on that person's driving record.

POINT III

**TO THE EXTENT EXPLORE'S REQUEST IS
PURSUANT TO OR CONTROLLED BY GRAMA,
ACCESS TO THE RECORDS WAS PROPERLY DENIED.**

To the extent that GRAMA applies to or controls Explore's request, the Division properly denied its request. The records sought by Explore have been properly classified as private since the records contain data on the individuals the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Explore is not an entity qualified under GRAMA to receive private records concerning these individuals.

POINT IV

**THE DRIVER'S PRIVACY PROTECTION ACT (DPPA)
IS A FEDERAL ACT THAT DOES NOT GRANT RIGHTS
OF ACCESS TO STATE GOVERNMENT RECORDS.**

The DPPA is a federal statute that, as applicable here, does not provide a federal right to state records, nor does it require states to provide access to their records. Rather, the DPPA restricts state agencies from giving any records to any individual or entity that does not qualify under DPPA.

ARGUMENT

POINT I

EXPLORE'S ACCESS TO THE DIVISION RECORDS IS THUS CONTROLLED BY UTAH CODE ANN. § 53-3-104 (2000), NOT BY GRAMA.

The Governmental Records Access Management Act, Utah Code § 63-2-101, et seq., (GRAMA) provides for a classification system of records of governmental entities and requires the disclosure of public records but places limitations on the disclosure of other records. However, GRAMA is not the sole source or authority with regard to access to governmental records. This is recognized in GRAMA in § 63-2-201(6)(a):

The disclosure of records to which access is governed or limited pursuant to court order, another state statute, federal statute, or federal regulation . . . is governed by the specific provision of that statute, rule, or regulation.

Thus, if there is another statute that provides for or limits access to records, its provisions govern and not the provisions of GRAMA. The Department of Public Safety, Driver's License Division (Division) has a specific provision in its organic statute regarding searching its files and preparing and providing a "report" on the "driving record" of any person. Utah Code § 53-3-104 provides:

The division shall:

...

- (9) search the license files, compile, and furnish a report on the driving record of any person licensed in the state in accordance with section 53-3-109.

The referenced Section 53-3-109 has a number of provisions, including limiting when the Division may disclose personal identifying information, such as only pursuant to the Federal Drivers Privacy Protection Act of 1994 (FDPPA), sets policy regarding fees, and references providing records in accordance with GRAMA. However, that reference in § 53-3-109 to GRAMA does not mean that § 53-3-104(9) is not an independent provision with regard to access to drivers license records.

Explore seeks a report on individuals who have received a citation within the prior month. As such, they are requesting the Division, and in response the Division is required to, search its files and compile a report on an individual with regard to his or her driving record. See Findings of Fact N. 6. Thus, since the Division's statutory provisions govern or limit access to records in these circumstances, that section controls. See Utah Code § 63-2-201(6)(a). This is a long-standing position of the Division and in fact had been upheld in the past by the State Records Committee. See Deseret News Publishing Company v. Utah Department of Public Safety, Driver's License Division, State Records Committee Case No. 92-02.

Explore claims that they are not seeking the entire Motor Vehicle Record (MVR) and therefore this section is not involved. However, as found by the trial court, the request for the information by Explore requires the Division to search its license files, compile, and furnish the report and driving record, thus triggering the section. Findings of Fact N. 6.

Since there is a special statute in the organic law of the Division regarding access to its records as requested by Explore, GRAMA recognizes that that provision controls over the provisions of GRAMA. Therefore, access to the records as requested by Explore is limited to the provisions of Utah Code § 53-3-104 and Utah Code Ann. § 53-3-109 (2000).

POINT II

EXPLORE IS NOT ENTITLED TO THE RECORDS SINCE IT DID NOT APPLY FOR NOR IS IT QUALIFIED TO RECEIVE THE RECORDS PURSUANT TO UTAH CODE ANN. § 53-3-104 (2000).

Explore has not formally requested the information pursuant to Utah Code § 53-3-104. This would have required them to pay an administrative fee for each search pursuant to § 53-3-105(30), which they have not offered to do. Further, they are not able to provide the information necessary to receive the report under this statutory provision.

Utah Code § 53-3-104 requires the Division to search its files, complete, compile and furnish a report on the driving record “of any person licensed in the state.” However, Explore has not and cannot identify the person on whom they want the report prior to the search. Thus, they cannot trigger the Division’s duties and obtain a report pursuant to §53-3-104(9). The trial court found that such was a correct interpretation of § 53-3-104 which the Division had long required. See Findings of Fact 14, Conclusions of Law 4.

This meaning of Utah Code § 53-3-104, requiring identification of the individual prior to the request, comports with the privacy interests recognized in GRAMA. See §

63-2-102(1)(b). Requiring that the individual be known prior to the search ensures that the person requesting information has knowledge of the person and reason to obtain the information. Additionally, limiting this to an individual request and payment of an individual fee tends to avoid the “power of the computer” – being able to search an extensive database based upon a characteristic unrelated to the previous identification of the individual, such as height, weight, zip code, citation -- produces a potentially greater invasion of personal privacy than when provided based upon an individual request. The State Records Committee has previously recognized the power of the computer and the ability to search a database as a rationale for its determination. See Salt Lake Tribune v. Utah Department of Transportation, State Records Committee Case No. 92-01.

Since Explore has not requested the records pursuant to Utah Code § 53-3-104, and since they do not have the ability to identify the individual prior to requesting the search, they are not authorized to receive the records pursuant to that provision. Therefore, it was appropriate for the Division to deny access to the records as requested.

POINT III

**TO THE EXTENT EXPLORE’S REQUEST IS
PURSUANT TO OR CONTROLLED BY GRAMA,
ACCESS TO THE RECORDS WAS PROPERLY DENIED.**

A. THE RECORDS WERE PROPERLY CLASSIFIED AS PRIVATE

GRAMA allows for the classification of government records as either public, private, controlled or protected. It provides the public a right to review public records but

restricts access to private, controlled or protected records. GRAMA deals with two sometimes competing rights:

- (1) In enacting this act, the Legislature recognizes two constitutional rights:
 - (a) the public's right of access to information concerning the conduct of public business; and
 - (b) the right of privacy in relation to personal data gathered by a governmental entity.

Utah Code § 63-2-102. GRAMA seeks to enforce those rights and to provide a method of reconciling those rights when they are in conflict. In recognizing the right of privacy in relation to personal data, GRAMA provides that various records are private and should not be disclosed. Utah Code § 63-2-302(2)(b) provides:

- (2) The following records are private if properly classified by a governmental entity:
 - (d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.

The Division determined that allowing access to the database and releasing the information or records after searching the database would constitute a clearly unwarranted invasion of the personal privacy of licensees. The trial court found this to be a reasonable determination. See Finding of Fact N. 3. This classification by the Division pre-dated the request by Explore for the information and was based upon the information in the database is such that individuals may not want to have released and/or made public, that the Division was merely a repository of information provided by their agencies, that the personal information would not shed light on the actions of the government or the

Division and its release would not be within the interests expressed in GRAMA, that since the search could be based upon factors other than the individual it engages the power of the computer to increase the invasive nature of the released information, as well as Attorney General Opinions 85-02. Finding of Fact N. 3. This classification has previously been upheld by the State Records Committee. See Equifax Services Inc. v. Utah Department of Public Safety, Driver's License Division, State Records Committee, Case No. 83-06.

The United States Government adopted the Freedom of Information Act (FOIA), 5 U.S.C. 552, et seq., which also recognizes the same two fundamental rights and attempts to similarly reconcile them in connection with federal records. FOIA also has a similar provision with regard to records being private if their release would constitute an unwarranted invasion of personal privacy. The Supreme Court discussed the purposes of FOIA and these two rights in Department of Justice v. Reporter's Committee, 49 U.S. 749, 773-5 (1989):

This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' Department of Air Force v. Rose, 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in

which one private citizen is seeking information about another—the requestor does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official ...

In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

The issue in this case is whether the Division properly classified the information in its database and the records requested by Explore as private. The information contained in the database clearly is data on individuals that is personal and would be considered private information. The fact that some or all of the information may have been in the public domain or is a public record in the hand of another entity is not determinative. In Reporter's Committee, supra, the requesters were seeking the rap sheet and criminal history of various individuals. The Court rejected the "cramped notion" of personal privacy that merely because the information in the rap sheet had been previously disclosed to the public or was available to the public elsewhere that the individuals had no privacy interest in the information or its release. The Court recognized that the privacy interests under FOIA, as well as under common law and constitutional law, included the

privacy interests of “avoiding the disclosure of personal matters,” “keeping personal facts away from the public eye,” and the “control[ling] of information concerning his or her person:”

In sum, the fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.

Reporters Committee, 49 US at 770 (citations and internal quotations omitted).

In Reporters Committee the Court in its analysis noted the concerns about personal privacy in information about individuals and weighed that against the public interest in the disclosure of the information, including whether it was related to the actions of the public entity and thus relevant under FOIA. The Court stated that the issue

must turn on the nature of the requested document and its relationship to the basic purposes of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document was being requested.

Reporters Committee, supra 49 U.S. at 772 (internal quotations and citations omitted).

The Court said it must balance the public interest in disclosure against the interest that the exemption from release was intended to protect – the privacy interests of the individuals.

In doing its analysis, the Court recognized the limited nature of the public interest in releasing the information:

There is, unquestionably, some public interest in providing interested citizens with answers to their questions about [the individual]. But that interest falls outside the ambit of the public interest that FOIA was enacted to serve.

Reporters Committee, 489 U.S. at 775. The Court then set forth its holding:

Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a governmental agency, but merely records that the government happens to be storing, the invasion of privacy is 'unwarranted.'

Reporters Committee, 489 U.S. at 780.

The Utah statutory provisions of GRAMA reflect the balancing of the same rights as under FOIA – the public right of access to information concerning the conduct of the public's business and the right of privacy in relation to personal data gathered by a governmental entity. Utah has the same type of definition of private information – data on individuals the release of which would constitute an unwarranted invasion of personal privacy. The balancing process is the same – the interests of the citizen in the information remaining private versus the public interests in public disclosure of the information. However, that interest in public disclosure pursuant to GRAMA is predicated upon the public's access to information concerning the conduct of the public's business. See Utah Code § 63-2-102(1)(a). Here, where Explore seeks the information not for seeing how the public's business is being run but for its own commercial uses, the Division correctly weighed the various interests and determined that release of these records would constitute a clearly unwarranted invasion of personal privacy.

Other federal cases similarly support the classification as here. In Department of the Air Force v. Rose, 425 U.S. 352 (1976), the Supreme Court found disclosure of Air Force Academy Honors and Ethics Code case summaries, even though for a law school project on military discipline and even though they had previously been published or made public, would constitute a clearly unwarranted invasion of personal privacy unless the personal identifying information was redacted so that the individuals could not be identified. In Minnis v. U.S. Department of Agriculture, 737 F.2d 784 (9th Cir.1984), cert denied, 471 U.S. 1053 (1985), the court held that the release of the names and addresses of the persons who had applied for permits to travel on the river would constitute a clearly unwarranted invasion of personal privacy. Since the Plaintiff's interest were commercial, the court noted:

[C]ommercial interest[s] should not weigh in favor of mandating the disclosure of a name and address list. Congress designed FOIA to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed, and to open agency action to the light of public scrutiny. FOIA was not intended to require release of otherwise private information to one who intends to use it solely for personal gain.

737 F.2d at 787(citations and internal quotations omitted). The court found significant that the disclosure of the names and addresses would reveal other information about the applicant, including personal things such as interests in water sports and the outdoors, and would subject them to a possible barrage of mailings, personal solicitations and other actions. And in Moltonomah County Medical Society v. Scott, 825 F.2d 1410 (9th Cir.

1987), the court held that to release the names and addresses of medicare beneficiaries in Portland would constitute an unwarranted invasion of personal privacy. This was so even though the name, address, age or disability might otherwise be publicly available, stating at page 1416:

Medicare beneficiaries have the right not to have their age and disability status made public in the absence of more compelling public and private interests favoring disclosure than are found in this case.

Similar analysis in this case supports the trial court's finding of the reasonableness of the classification of the database and records as private. Explore is seeking, for its own commercial interests, the names of individuals and other personal and private information based on some search criteria (here citations and action on an individual's record) from the Division's database. There is no public interest in the release, at least in terms of the public interest sought to be furthered by GRAMA, as the information is not sought concerning the conduct of the public's business or the actions of the Division. In balancing the public's interest in disclosure and the privacy interests of the licensees, the Division and trial court correctly determined that the release of the information would be an unwarranted invasion of privacy and therefore the records are properly classified as private.

Explore also complains that the trial court and the Division improperly failed to take into account the status of Explore and its purpose for accessing the database in obtaining the records. However, that concern is not relevant with regard to a

classification of the record, which is a balancing of the general public interest in disclosure versus the personal interest in privacy. That concern and argument also came up on Reporters Committee, supra, which the court rejected:

Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request . . . As we have repeatedly stated, Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest [in a particular document]. As professor Davis explained, ‘The Acts’ sole concern is what must be made public or not be made public.’

Reporters Committee, supra, 489 U.S. at 771-2 (internal quotations, citations and ellipses omitted).

Thus, the individual status of the requestor and the intended use of the request are not appropriate in considering classification of the database and documents. It may be relevant in connection with a discretionary release of private information, but that is not involved here. See further discussion in Point III C herein.

B. EXPLORE IS NOT AUTHORIZED UNDER GRAMA TO RECEIVE PRIVATE RECORDS.

The provisions of GRAMA limit who may receive a private record. Utah Code Ann. § 63-2-201 5(a) (2000) provides:

A governmental entity may not disclose a record that is private, controlled, or protected to any person except as provided in Subsection (5)(b), Section 63-2-202, Section 63-2-206.

None of these apply here. Subsection (5) allows discretionary release if the head of a governmental entity engages in an interest weighing and determines that release is appropriate, which has not occurred and which is not involved here. See Utah Code § 63-2-201(5)(b) and Point III C herein. § 63-2-202 allows private records to be released to the subject of the record or his or her legal guardian, someone with a power of attorney from the subject, or any person to whom the record must be provided pursuant to a court order.

Thus, Explore is not an entity entitled to receive private records of licensees under GRAMA and therefore the denial of access to the database and denial of the records to Explore was proper and should be upheld.

C. DISCRETIONARY AUTHORITY TO RELEASE PRIVATE INFORMATION IS NOT INVOLVED HERE.

GRAMA allows for a discretionary weighing of the privacy interests in restricting access to records and the public interests favoring access to be done by an agency head, the Records Committee, or the Court upon request of the records are private. See Utah Code §§ 63-2-201(5)(b), 63-2-403(11)(b and c), and 63-2-404(a). That review can result in the release of a private record to someone not otherwise entitled to receive a private record, notwithstanding the other provisions of GRAMA. However, that request was not made of the agency, was not asked of the Records Committee, and was not asked of the district court. Further, this appeal has not been brought directly addressing or challenging

any such discretionary action by any of those entities. Further, that issue was not raised below in the trial court nor in the State Records Committee, and it is barred from being raised now.

Explore argues in its brief that it is appropriate to take into account the individual status of the requester (Explore) and the intended use of the information and weigh that against the privacy interests of the licensees. However, Explore makes that argument and discussion in the context of the classification of the records by the agency, where it has no relevance. It may be relevant in terms of being reviewed by the head of a governmental entity to release it in special circumstances, but that is not this case nor is it before the court.

POINT IV

THE DRIVER'S PRIVACY PROTECTION ACT (DPPA) IS A FEDERAL ACT THAT DOES NOT GRANT RIGHTS OF ACCESS TO STATE GOVERNMENT RECORDS.

As part of the Clinton Crime Control Act, the federal government adopted the Drivers Privacy Protection Act, 18 U.S.C. Chapter 123. That Act prohibits states from releasing personal identifying information to persons and entities other than those listed in the Act for the purposes expressed therein. The Act then goes on to allow, but not require, states to provide records in various circumstances. Thus, the DPPA acts as a federal filter, limiting what information can be released, but does not act to grant any federal right to access state information or government records. Thus, any argument or

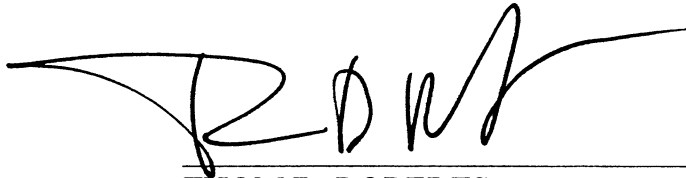
claim under DPPA is not relevant to the decision here, since the issue is whether the Division and trial court properly classified the database and the records sought by Explore as private under state law and whether Explore has the right to access the database and the records of the Division under state law. The parties agreed that Explore qualifies as an agent or contractor of an insured or self-insured under DPPA, see Findings of Fact N. 12, but that does not add any additional right to the records as requested by Explore, but only means that DPPA does not bar Explore from obtaining the records.

CONCLUSION

Since there is a statutory provision within the organic law of the Division concerning access to these records, Explore is required to follow that statutory provision and not GRAMA. Explore does not qualify under that statutory provision and therefore denial of the access to the database and to the records requested was appropriate by both the Division and the trial court. Further, to the extent that the provisions of GRAMA apply, the database and records sought by Explore were properly classified as private records, and since Explore is not authorized to receive private records of licensees under GRAMA, the Division and trial court correctly denied access to the database and the records. Therefore, this Court should affirm the trial court's decision upholding the Division's denial of access to its database and the records requested by Explore.

Dated this 1ST day of July, 2004.

MARK L. SHURTLEFF
Attorney General

A handwritten signature in black ink, appearing to read 'R D W', written over a horizontal line.

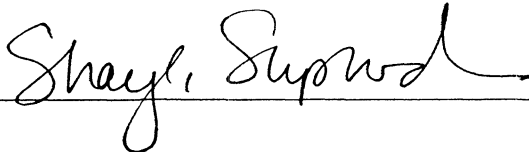
THOM D. ROBERTS
Assistant Attorney General
Attorneys for Appellee/Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLANT to be hand delivered this 2nd day of July, 2004, to:

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dba Explore Information Services
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Salt Lake City, Utah 84111
Attorneys for Appellant/Respondent

MARK E. BURNS
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Salt Lake City, UT 84114-0857
Attorney for State Records Committee



ADDENDUM

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MARK L. SHURTLEFF (#4666)
Attorney General
Attorneys For Appellee
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Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353

FILED DISTRICT COURT
Third Judicial District

OCT 26 2003

By W. B. Bohling
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF PUBLIC
SAFETY, DRIVER'S LICENSE
DIVISION,

Petitioner,

vs.

ROBOT AIDED MANUFACTURING
CENTER, INC. dba EXPLORE
INFORMATION SERVICES.

Respondents.

JUDGMENT AND ORDER

Case No. 000910012 AA

Judge: William B. Bohling

The above entitled matter having come on regularly for hearing on Monday, June 4, 2001 at the hour of 2:00 p.m., the Honorable William B. Bohling, District Court Judge presiding, on judicial review of an administrative decision regarding access to records, and the Court having previously made and entered its Findings of Fact and Conclusions of Law, and based thereon, it is hereby

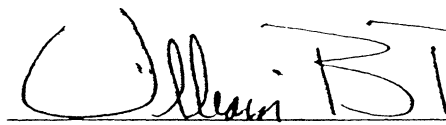
ORDER, ADJUDGED AND DECREED that the decision of the State Records Committee requiring Petitioner Utah Department of Public Safety, Drivers License Division to provide information as requested to Responded Robot Aided Manufacturing Center dba Explore Information Services shall be and the same is hereby vacated and reversed; it is further

ORDER, ADJUDGED AND DECREED that Petitioner's denial of access to the requested information was proper and lawful and they need not provide such information as requested; it is further

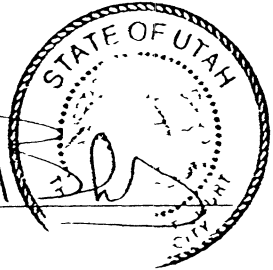
ORDER, ADJUDGED AND DECREED that each partial bear their own costs and attorney's fees.

DATED this 20 day of October, 2003.

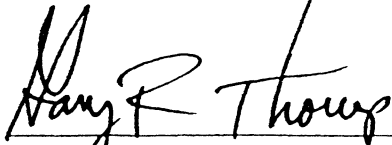
THIRD DISTRICT COURT



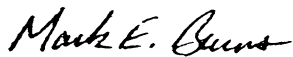
WILLIAM B. BOHLING
District Court Judge



Approved as to form:



Gary R. Thorup
Attorney for Explore



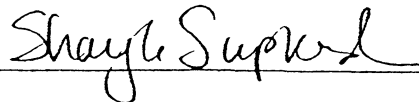
Mark Burns
Attorney for State Records Committee

CERTIFICATE OF SERVICE

I hereby certify that I mailed or hand-delivered a true and correct copy of the above
JUDGMENT AND ORDER on the 3rd day of October, 2003 to:

Gary R Thorup
HOLME ROBERTS & OWEN
299 South Main, Ste 1800
Salt Lake City, UT 84111-2263

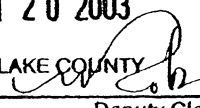
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FILED DISTRICT COURT
Third Judicial District

OCT 20 2003

By 
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF PUBLIC
SAFETY, DRIVER'S LICENSE
DIVISION,

Petitioner,

vs.

ROBOT AIDED MANUFACTURING
CENTER, INC. dba EXPLORE
INFORMATION SERVICES,

Respondents.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 000910012 AA

Judge: William B. Bohling

The above entitled matter having come on regularly for hearing on Monday, June 4, 2001 at the hour of 2:00 p.m., the Honorable William B. Bohling, District Court Judge presiding, on judicial review of an administrative decision regarding access to records, Petitioner Utah Department of Public Safety, Drivers License Division (Division) appearing through counsel, Thom D. Roberts, Assistant Attorney General, Respondent Robot Aided Manufacturing Center

Inc. dba Explorer Information Services (Explore) through counsel, Mr. Gary Thorup, Holme Roberts and Owens, and Respondent State Records Committee appearing through counsel, Mark Burns, Assistant Attorney General, and the Court having received and reviewed the Stipulated Facts submitted by the Respondents, the Written Proffer of Evidence submitted by the Petitioner, the Memoranda submitted by the parties and the arguments of counsel, and being fully advised in the premises, hereby makes its

FINDINGS OF FACT

1. That the Division is an agency of state government and, among other duties, is required to maintain various records and files with regard to the over 1.4 million licensees and identification card holders in the State of Utah. These records and files are maintained in a electronic database which includes the following items: every application for a license including the various items of personal information contained therein, such as name, date of birth, social security number, resident's mailing address, physical description, military status, and the answers to various medical questions; citation and arrest reports on DUI and drug arrests, whether or not there has been a conviction; records of the conviction of traffic offenses, including date, location, and personal information on the individual (including name, social security number, address, etc.); sentencing and other court information; acts and citations, financial responsibility reports regarding accidents (including accident, insurance details, and personal information), and SR-22

and SR-26 insurance filings (reflecting high risk insurance or high risk insurability); medical and psychological reports from physicians and other health care providers; departmental and administrative actions against the licensees; address and name changes; driving courses taken, including defensive driving and alcohol classes; and records and details from the courts regarding pleas, convictions and judgments.

2. That through the early 1980's the Division sold lists of its licensees. However, after the Division received Attorney General Opinion 85-02 Selling of Departmental Records, the Division determined that the private information on individuals in its database and records system, other than that which must be released pursuant to the statutory release provisions of the prior Utah Code, §53-3-104(9), should not be released because such abridged the privacy rights of the licensees.

3. That after the adoption of the Governmental Records Access Management Act (GRAMA) in 1991, the Division determined that some of the information in its database involving its licensees was protected, some confidential, some was prohibited by statute from being released, and that all the information in the database were records containing data on individuals. The Division reasonably determined that disclosure of such private information would constitute a clearly unwarranted invasion of personal privacy and classified records as private under GRAMA. This decision was based upon Attorney General's Opinion 85-02, and that the information was personal information which the individuals may not want to have

released and/or made public, that the Division was merely a repository of the information provided by other agencies, and that the personal information would not shed light on the actions of the government or the Division.

4. That up through the 2000 legislative session, the Division was required to provide, upon request, a report on the driving record of any person licensed in the state. The Division had previously determined that the report on the driving record of any person was equivalent to the “motor vehicle report (MVR)” which is something that is regularly used by employers and interstate in connection with driver’s license and employment. That the Division has defined the “driving record” under 53-3-104(9) as the driver’s name, license number, date of birth, five digit zip code, military status, reportable arrests and convictions, reportable departmental actions, driver’s license status, driver’s license issue and expiration dates, license class/type/endorsements, and reportable failures to appear or failures to clear tickets or warrants.

5. That pursuant to an agreement entered into between Explore and the Division, Explore has been receiving certain driving information on a monthly basis concerning certain Utah drivers from the Division since December 1996, which agreement has subsequently expired.

6. That the driving information received by Explore was limited to a person’s name, driver’s license number, date of birth, type of violation and the date when the violation was recorded in the Division’s database. This information received by Explore represents only a

portion of the total information contained in the Division's files and records comprised in the driving records of licensed individuals. However, this request requires the Division to do a search of its files and prepare a report on the driving record of each such individual.

7. On June 28, 2000, the Division informed Explore by letter that it was refusing to provide the information in the future because Explore had failed to comply with the requirements of Utah Code §53-3-104(9) and that the release of the driving information to Explore would constitute a clearly unwarranted invasion of personal privacy and thus the records were private and Explore was not authorized to receive private records. Explore appealed the Division's determination to the designated person within the Department of Safety.

8. By decision dated July 21, 2000, the Department of Public Safety affirmed the Division's determination by written decision. Explore then appealed the denial to the State Records Committee.

9. Explore's appeal was heard by the State Records Committee on August 9, 2000. At the hearing, the Committee received copies of documents, proffers of testimony and testimony, legal authority, and oral argument by counsel. The hearing was recorded and after deliberation in open the Committee ruled in favor of Explore granting access to the records of the Division.

10. Following the issuance of the Committee's Decision and Order, Explore filed a Motion to clarify the Committee's decision and, after further proceedings, on November 15th the

Committee issued a written Amended Decision and Order granting Explore's appeal and requiring continued access to the records of the Division.

11. Explore is a Minnesota Corporation registered to do business in the State of Utah. As part of its business, Explore obtains certain driving information contained within the Motor Vehicle Records of various states and provides this data to certain property and casualty insurance companies for underwriting purposes. Explore provides this service in more than 20 states.

12. Explore qualifies as an "agent" or "contractor" of an "insured" or "self-insured entity" under the Drivers Privacy Protection Act of 1994(DPPA), 18 USC §27-21, et seq. The DPPA therefore would not prohibit Explore from receiving this information.

13. Explore continues to receive this driving information in other states in which it conducts its business.

14. The Division will continue to provide a report on the driving record of any person pursuant to Utah Code §53-3-104 should they qualify with requirements of that section as well as §53-3-109. The Division has interpreted that section to require that such a report can be done only on a person by person basis, so that the requestor has the name and has identified the individual about whom the driving record information is sought prior to the request. The Division complies with such requests over the counter at the Division offices, by mail, or on-line over the internet.

15. There is no evidence that Explore has ever used the driving information received by the Division for anything but its stated purpose and uses.

16. That in June of 2000 Explore, through the reports that it received, obtained the identities of 21,726 individuals along with their report of violations from the previous month; in July 2000 Explore received 22,932 such records, which constitutes approximately 2% of the licensed drivers. Explore uses this list of names and compares it with the list of insureds for different insurance companies which it contracts with, which is its business. Explore will normally obtain matches with its insurance companies from the lists it obtained from the Division constituting approximately 2% of the number of individuals identified with the records from the Division each month.

Wherefore, having now made and entered its Findings of Fact, the Court hereby makes and enters its:

CONCLUSIONS OF LAW

1. This is Judicial Review from the decision of the State Records Committee pursuant to Utah Code § 63-2-404 and is to be conducted by trial de novo, although not governed by the provisions of the Utah Administrative Procedures Act.

2. That Explore, a requestor of information from a governmental entity, continues to have the burden of proof in this proceeding that it is entitled to the information it seeks.

3. GRAMA provides that if disclosure of records is governed or limited by another statute or regulation, that that other provision controls access, Utah Code § 63-2-201(6)(a); that Utah Code § 53-3-104 is such a provision and governs or limits access to the information sought by Explore and therefore it controls its access.

4. That if Explore complies with the requirements of § 53-3-104 as interpreted and enforced by the Division, by identifying the licensee as an individual prior to the request, and pay any applicable fees, that it may receive the motor vehicle report on the individual, otherwise it may not.

5. That the information, records, and database were properly classified by the Division as private.

6. That the Division properly did not take into account Explore's interest in disclosure in making its decision to deny the information requested.


7. That Explore is not an entity authorized to receive private information pursuant to Utah Code § 63-2-202.

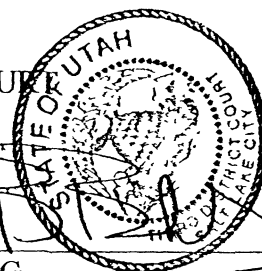
8. That the request by Explore for commercial reasons for personal data for individuals unrelated to the functioning operation of the Division is not within the purposes of GRAMA concerning the right of access to information concerning conduct of a public business, and the Division's decision not to release the data under such circumstances was justified.

9. That the Division properly denied continued access to the information sought by Explore, that the decision of the State Records Committee requiring such release was in error, the State Records Committee decision should be reversed and an order issued by this Court that the Division properly denied their request for the information to Explore.


DATED this 20 day of October, 2003.

THIRD DISTRICT COURT



WILLIAM B. BOHLING
District Court Judge



Approved as to form:



Gary R. Thorup
Attorney for Explore



Mark Burns
Attorney for State Records Committee

CERTIFICATE OF SERVICE

I hereby certify that I mailed or hand-delivered a true and correct copy of the above Findings of Fact and Conclusions of Law on the 3rd day of October, 2003 to:

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Salt Lake City, UT 84111-2263

Mark Burns
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